

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GAYRAT BODOMOV	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES, et al.	:	NO. 07-1482

MEMORANDUM

I. Introduction

Gayrat Bodomov, (“Plaintiff”) asks this Court for declaratory and injunctive relief in the nature of mandamus to compel Defendants¹ to act on his application for naturalization. Plaintiff asserts claims against Defendants pursuant to applicable provisions of the United States Constitution, The Immigration and Nationality Act, (“INA”) 8 U.S.C. § 1101 et seq; 28 U.S.C. § 1331; the Mandamus Act, 28 U.S.C. § 1361; the Declaratory Judgment Act, (“DJA”) 28 U.S.C. § 2201 et seq; and the Administrative Procedures Act, (“APA”) 5 U.S.C. §§ 555 and 701 et seq. (Doc. No. 1). Plaintiff also seeks attorney’s fees under the Equal Access to Justice Act, (EAJA) 5 U.S.C. § 504 and 28 U.S.C. § 2412. Defendants move to dismiss Plaintiff’s action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. No. 4). The court denies Defendants’ motion.

¹ Plaintiff brings this action against the United States Department of Justice, and former Attorney General Alberto Gonzales, The Federal Bureau of Investigation, and its Director Robert Mueller, United States Department of Homeland Security and its Secretary Michael Chertoff, Director of United States Citizenship and Immigration Services Department of Homeland Security, Emilio Gonzales, and District Director of Department of Homeland Security United States Citizenship and Immigration Services. As all of Defendants are United States government departments or officials, the Court will refer to them as “Defendants.”

II. Background

Plaintiff was born in the former Soviet Union and has been residing in the United States since 1999. Plaintiff alleges that he filed an application for naturalization (Form N-400) on October 12, 2004, and that he satisfies all of the criteria and requirements for citizenship of the United States. Subsequently, Plaintiff received a Notice of Action, scheduling his interview with the United States Citizenship and Immigration Service (“USCIS”) for July 11, 2005.

Approximately two weeks before that date, Plaintiff received another Notice of Action, informing him that the interview had been cancelled “due to unforeseen circumstances.” Since then, Defendants have taken no action and have not responded to Plaintiff’s inquiries regarding his application. (Pl.’s Resp. in Opp. to Def.’s Mot. to Dismiss, at 2).

III. Parties Contentions

The government moves to dismiss the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), contending that neither the Mandamus Act, the INA, or the APA provide a judicial remedy in a situation where, as here, the agency’s implementing regulations do not create a duty for the agency to adjudicate an application for naturalization within any particular time period. (Def.’s Mot. to Dismiss, at 4-5). The government asserts that the only agency action that can be compelled under the APA is action that is legally required, Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004), and that “a delay cannot be unreasonable with respect to action that is not required.” Id. at 63 n. 1.

Plaintiff argues against this reading of the applicable statutes, urging the Court to find jurisdiction appropriate under the APA, the Mandamus Act, and/or the United States Constitution. Plaintiff maintains that, under the INA, the government has a mandatory

responsibility for administration of the naturalization process in a reasonably prompt manner.

(Pl.'s Resp. in Opp. to Def.'s Mot. to Dismiss, at 5). There is no Circuit Court opinion on point.

IV. Legal Standards

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

When considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). The court "may not presume the truthfulness of plaintiff's allegations, but rather must evaluate for itself the merits of the jurisdictional claims." Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) (brackets omitted).

This Court has original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 28 U.S.C. § 1361. The common-law writ of mandamus is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear non-discretionary duty. Heckler v. Ringer, 466 U.S. 602, 616, 104

S.Ct. 2013, 80 L.Ed.2d 622 (1984). Mandamus may issue to require the exercise of permissible discretion, although the manner in which the discretionary act is to be performed is not to be directed by the court. Pennsylvania ex rel. Sheppard v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11, 27 (3d Cir. 1975), overruled in part on other grounds by Pennsylvania v. Porter 659 F.2d 306 (3d Cir. 1981).

The APA provides that a court “shall...compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1); see also Id. § 555(b) (providing that within a reasonable time, each agency shall proceed to conclude a matter presented to it). Although “the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action,” if a plaintiff states an APA claim under § 706(1), an independent ground for jurisdiction exists under the federal question statute, 28 U.S.C. §1331, subject only to preclusion of review statutes created or retained by Congress. Shaat v. Klapakis, No. 06-5625, 2007 WL 2768859 (E.D.Pa. Sept. 21, 2007) (Pollak, J.) (citing Califano v. Sanders, 430 U.S. 99, 107).

V. Discussion

The agency action at issue in the instant case is the processing of an application for naturalization. Title V of the Immigration Act of 1990 provides the statutory basis for the naturalization process. A person who has been lawfully admitted to the United States for permanent residence is eligible to become a citizen upon establishing five years of continuous residence in the United States and a showing of good moral character. 8 U.S.C. § 1427(a). The statute, in conjunction with agency regulations, sets out a four-step procedure for naturalization: (a) the filing of the application itself; (b) an investigation and background check; (c) an

examination; and (d) the administration of the oath of allegiance. 8 U.S.C. § 1446(a); 8 C.F.R. § 335; see also Ajmal v. Mueller, No. 07-206, 2007 WL 2071873, at *2 (E.D.Pa., July 17, 2007) (Kauffman, J.). Plaintiff's application is currently stalled at the second step of the process, the background check.

In the past year, several judges in this District, including the undersigned, have faced cases where the claims and facts are the same as the instant case for all relevant purposes: in all these cases, petitioners have moved the Court to issue writs of mandamus to compel the Government to proceed with their naturalization applications, where those applications have been delayed for an extended period of time, asserting that the Court has jurisdiction under the INA, the APA and the Mandamus Act; in each of these cases, the government has filed motions to dismiss for want of jurisdiction. In each of these cases, the Court has denied the Government's motion to dismiss and allowed the case to proceed to discovery. See Mocano v. Mueller, No. 07-0445, 2007 WL 2916192 (E.D.Pa. Oct. 3, 2007) (Baylson, J.); Shaht v. Klapakas, No. 06-5625, 2007 WL 2768859 (E.D.Pa. Sept. 21, 2007) (Pollak, J.); Ajmal v. Mueller, No. 07-206, 2007 WL 2071873 (E.D.Pa. July 17, 2007) (Kauffman, J.); Song v. Klapakas, No. 06-05589, 2007 WL 1101283 (E.D.Pa. April 12, 2007) (Stengel, J.); Kaplan v. Chertoff, 481 F. Supp. 2d 370, 399 (E.D.Pa 2007) (Robreno, J.).

Although subject matter jurisdiction is not free from doubt, in the absence of any Circuit Court opinion on the issue presented, the undersigned will defer to these decisions of this Court at this time and deny the Government's Motion to Dismiss. If the Third Circuit decides that the federal courts lacks subject matter jurisdiction, of course this Court will be bound and this case will be dismissed at that time.

V. Conclusion

At this time, Plaintiff's Complaint will remain before this Court and the parties will proceed with any discovery that may be necessary, and then with dispositive motions. An appropriate order to follow.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GAYRAT BODOMOV	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES, et al.	:	NO. 07-1482

ORDER

AND NOW, this ____ day of December, 2007, upon consideration of Defendants' Motion to Dismiss, (Doc. No. 4) and Plaintiff's Opposition thereto, (Doc. No. 5) and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.